RECORD AND BRIEFS

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No. 15-9260

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IN THE SUPREME COURT OF THE UNITED STATES

LEVON DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial evidence was sufficient to establish that petitioner's robbery of a dealer of illegal drugs "in any way or degree * * * affect[ed] commerce," in violation of the Hobbs Act, 18 U.S.C. 1951.

2. Whether a sentencing court, when sentencing a defendant who has been convicted of a firearms offense under 18 U.S.C. 924(c) and a predicate crime of violence, may reduce the sentence for the predicate offense to lower the aggregate sentence that results from the consecutive, mandatory-minimum sentence for the Section 924(c) offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1) is reported at 810 F.3d 521. The opinion of the district court is not published in the Federal Supplement but is available at 2014 WL 7339215.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2015. A petition for rehearing was denied on February 12, 2016 (Pet. App. A-2). The petition for a writ of certiorari was filed on May 4, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of conspiracy to commit Hobbs Act robbery and two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); two counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1); and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g). The district court sentenced petitioner to 400 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A-1.

1. In April 2013, petitioner and others both conspired to rob and robbed two drug dealers of drugs and other property on two occasions. Pet. App. A-1, at 2-4. Petitioner committed those offenses in an area around Sioux City, Iowa, where the state boundaries of Iowa, Nebraska, and South Dakota meet. Id. at 7.

a. Jeffrey Rollinger (J.R.) was a known methamphetamine and marijuana dealer who sold drugs in both Iowa and South Dakota. Although J.R. sold such drugs for money, he also had previously sold methamphetamine to Sara Berg (one of petitioner's codefendants) and Jessica Cabell (a prostitute) in exchange for sex. Berg believed that J.R. had stolen money from her and,

while at a home in South Sioux City, Nebraska, she hatched a plan with petitioner, petitioner's brother and co-defendant, and Cabell to rob J.R. when J.R. was scheduled to have a "date" with Cabell. They believed that J.R. would likely have drugs and money with him at that time. Pet. App. A-1, at 3, 7; Gov't C.A. Br. 10, 37-39; see 12/23/2014 D. Ct. Op. 2-3 (Doc. 343).

On April 15, 2013, the group traveled from the Nebraska residence (where they had conceived their plan) to the motel in Sioux City, Iowa, at which Cabell had agreed to meet J.R. for the "date." Cabell first met with J.R. in his motel room, and the two began to smoke methamphetamine. Berg, petitioner, and petitioner's brother subsequently entered the room; Berg confronted J.R. about the money; petitioner's brother demanded money from J.R. at gunpoint and hit J.R. with a rifle; and petitioner ransacked the room looking for drugs and money. The group, however, did not find any significant amount of drugs or money. They instead took J.R.'s pipe containing a small amount of methamphetamine, his cell phone, his car keys, and his car, which they drove back to Nebraska. Pet. App. A-1, at 2-3; Gov't C.A. Br. 10-11, 38-40.

b. Nine days later, on April 24, 2013, petitioner and his brother robbed another drug dealer, Craig Barclay. Barclay, like J.R., engaged in interstate drug dealing: Barclay obtained methamphetamine in Nebraska and sold it in Iowa, South Dakota,

and Nebraska. Petitioner and his brother robbed Barclay at gunpoint at his home in Sioux City, Iowa, obtaining approximately $300 in cash, 20 grams of the methamphetamine from Nebraska, a digital scale, other smaller items, and Barclay's two cars. Pet. App. A-1, at 3-4, 7; 12/23/2014 D. Ct. Op. 4-5; Gov't C.A. Br. 11-12, 41.

2. A federal jury found petitioner guilty on one count of conspiracy to commit Hobbs Act robbery (Count 1), in violation of 18 U.S.C. 1951(a); two counts of Hobbs Act robbery for the robberies of J.R. and Barclay (Counts 2-3), in violation of 18 U.S.C. 1951(a) and 2; two counts of possessing a firearm in furtherance of those crimes of violence (Counts 6 and 7), in violation of 18 U.S.C. 924(c)(1) and 2; and one count of possessing a firearm after having been convicted of a felony (Count 9), in violation of 18 U.S.C. 922(g). Judgment 1-2 (Doc. 366); Third Superseding Indictment 3-14 (Doc. 154); see Verdict 11-18 (Doc. 284). The district court rejected petitioner's motion for a judgment of acquittal, holding, as relevant here, that the evidence was sufficient to establish that petitioner's robberies of the drug dealers had an effect on commerce as required by the Hobbs Act. 12/23/2014 D. Ct. Op. 11-13.

At sentencing, petitioner argued that the district court should grant a downward variance for the non-Section 924(c) felony counts associated with each robbery. Sent. Tr. 4-11.

Although the three Hobbs Act counts and felon-in-possession count carried an overall advisory Sentencing Guidelines range of 84 to 105 months, petitioner argued that the court should impose concurrent sentences of just one day for the four felony counts because the two Section 924(c) counts already carried mandatory five- and 25-year consecutive sentences and because, in petitioner's view, an aggregate sentence of 30 years of imprisonment was sufficient. Id. at 4-5; see id. at 2; PSR ¶¶ 15-28. The district court concluded that it was not authorized to impose a one-day sentence if it deemed an aggregate sentence of thirty years to be sufficient; the court instead held that it must evaluate the sentences for the non-Section 924(c) counts and the Section 924(c) counts "separately." Sent. Tr. 13-14.

The district court stated that "if [it] was just looking at the conduct in [the non-Section 924(c) counts]," "there's no way" that it would "vary down to one day" from the 84 months at the bottom of the Guidelines range, and the court doubted that any "judge in the country" would grant such "an extraordinary variance." Sent. Tr. 7, 9. The court ultimately "var[ied] down[ward] from 84 months down to 40 months," which when added to the 30 years of imprisonment for petitioner's Section 924(c) counts, yielded a total sentence of 400 months of imprisonment. Id. at 12-13. The court noted that if petitioner were correct that it could impose a single sentence as "a combined package,"

the court would have sentenced him "to the two mandatory minimums which total 360 months and then g[a]ve 1 additional day" for his four remaining felony convictions. Id. at 13. If petitioner were to prevail on this issue on appeal, the court added, it would on remand reduce his sentence "to one day." Id. at 12.

3. The court of appeals affirmed. Pet. App. A-1. As relevant here, the court held that the evidence was sufficient to establish the Hobbs Act's commerce element, id. at 2 n.1, 6-8, and that the district court correctly rejected petitioner's request to impose a one-day sentence for his four non-Section 924(c) felony counts of conviction, id. at 17.

a. The court of appeals explained that the Hobbs Act makes it a federal offense to commit a "robbery that affects interstate commerce." Pet. App. A-1, at 2 n.1. Under its then-existing precedent, the court explained, the government must specifically prove in each case that a "robbery of a drug dealer is linked to interstate commerce" in order to establish a Hobbs Act violation. Ibid. That requirement, the court continued, was "unlike the Fourth Circuit['s]" rule in United States v. Taylor, 754 F.3d 217 (4th Cir. 2014), aff'd, 136 S. Ct. 2074 (2016), under which "the robbery of a drug dealer is [deemed] an inherent[ly] economic enterprise that satisfies the [Hobbs Act's] interstate[-]commerce element." Pet. App. A-1, at 2 n.1.

The court thus found it "doubt[ful]" that the "ultimate outcome in Taylor," which was then pending review on the merits in this Court, would affect the proper resolution of petitioner's case. Ibid.

The court of appeals concluded that the trial evidence showed that each of petitioner's robberies "affected the [drug-dealing] victim's ability to buy and sell drugs in interstate commerce." Pet. App. A-1, at 6-7. J.R., the court explained, not only engaged in interstate drug dealing because he sold methamphetamine in both South Dakota and Iowa, petitioner's robbery itself interrupted an "interstate encounter" in which J.R. was "hoping to exchange methamphetamine for sex with Cabell." Id. at 7. Barclay, the court added, also ran an interstate drug operation in which he obtained methamphetamine in Nebraska and "sold it in Iowa, South Dakota, and Nebraska"; and petitioner robbed methamphetamine from Barclay that Barclay otherwise "would have * * * distributed." Ibid.

b. On the sentencing question, the court of appeals concluded that the "district court correctly noted [its] inability to sentence [petitioner]" to just "one day for the [non-Section 924(c)] counts." Pet. App. A-1, at 17. The court explained that it had previously held in United States v. Hatcher, 501 F.3d 931, 933-934 (8th Cir. 2007), cert. denied, 552 U.S. 1170 (2008), that a district court had unreasonably "sentenc[ed] a

defendant to one day for the crimes not subject to [Section 924(c)'s] mandatory minimum." Pet. App. A-1, at 17. Because petitioner had identified "no meaningful difference between the situation in Hatcher and what [petitioner] requested in this case," the court concluded that the sentencing court did not abuse its discretion in declining to grant petitioner's request for a one-day sentence. Ibid.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the court of appeals erred in affirming his Hobbs Act conviction for robbing J.R. (Count 2) because, in petitioner's view, the evidence was insufficient to show either that J.R. was "involved in drug distribution [a]ffecting commerce during the time of the robbery" or that petitioner "inten[ded] to rob a 'drug dealer.'" The court of appeals correctly concluded that, even before this Court's Hobbs Act decision in Taylor v. United States, 136 S. Ct. 2074 (2016), the evidence was sufficient to sustain petitioner's Hobbs Act conviction because the evidence showed that petitioner's robbery targeted and stole drugs from a drug dealer who was engaged in interstate drug dealing and because the robbery would have had at least a "small" effect on J.R.'s "ability to buy and sell drugs in interstate commerce." Pet. App. A-1, at 6-7. This Court's decision in Taylor, which was

issued after petitioner filed his certiorari petition, now confirms that the judgment of the court of appeals is correct.

The Hobbs Act, as relevant here, makes it an offense to "in any way or degree obstruct[], delay[], or affect[] commerce * * * by robbery." 18 U.S.C. 1951(a). The Act further defines "commerce" to include any "commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). This Court in Taylor held that when a Hobbs Act prosecution is brought for "the robbery or attempted robbery of a drug dealer," the Act's commerce element is satisfied by proof that the "defendant knowingly stole * * * drugs or drug proceeds" because, "as a matter of law, the market for illegal drugs is 'commerce over which the United States has jurisdiction.'" 136 S. Ct. at 2081. "[T]he Government," the Court explained, thus "need not show that the drugs that a defendant stole * * * either traveled or were destined for transport across state lines." Ibid. And, the Court emphasized, "it makes no difference" that the "effect on commerce in a particular case is minimal." Ibid. Under Taylor, the evidence that petitioner robbed a known drug dealer and stole a small amount of methamphetamine from that dealer is sufficient to sustain his Hobbs Act conviction.

Indeed, the trial evidence is more than sufficient to establish the Hobbs Act's commerce element. The evidence showed that the robbery was intended to interrupt an interstate drug

transaction at a hotel in Iowa in which J.R. planned to exchange methamphetamine for sex with Cabell (a prostitute) who traveled to their meeting from Nebraska. Moreover, petitioner's robbery was designed to steal (and was somewhat successful in stealing) assets from J.R., the theft of which would have had some effect on J.R.'s ability to engage in interstate drug dealing. To the extent that petitioner contends that the evidence was insufficient to establish the historical facts as described by the district court and court of appeals, that fact-bound contention merits no further review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Petitioner contends (Pet. 11-13) that the district court was authorized to impose a "sentence of 1 day" for his three Hobbs Act felonies and his felon-in-possession offense to take account of the five- and 25-year mandatory consecutive sentences that must be imposed under Section 924(c) for his convictions for possessing a firearm in furtherance of the Hobbs Act robberies. Petitioner further contends (ibid.) that the court of appeals' contrary conclusion conflicts with this Court's decision in Pepper v. United States, 562 U.S. 476 (2011), and the Tenth Circuit's decision in United States v. Smith, 756 F.3d 1179 (2014). The decision of the court of

appeals is correct, and the sentencing question that petitioner presents does not warrant this Court's review at this time.

a. Section 924(c) makes it unlawful to possess a firearm in furtherance of a crime of violence or drug trafficking crime. 18 U.S.C. 924(c)(1)(A). Any person who violates that prohibition "shall, in addition to the punishment provided for [the predicate] crime of violence or drug trafficking [offense]," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," shall "be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i). Section 924(c) further provides that, "[n]otwithstanding any other provision of law," no term of imprisonment imposed under Section 924(c) "shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed [for the predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii). Those provisions, when read in context of the sentencing provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 et seq.), reflect Congress's intent that sentencing courts (1) impose a criminal sentence for any non-Section 924(c) count of conviction that would be appropriate for the offense if committed without the Section 924(c) offense conduct and (2) impose the punishment for the Section 924(c) offense on top of such a

sentence. As this Court has observed, the "longstanding thrust" of Section 924(c) is "its insistence that sentencing judges impose additional punishment for § 924(c) violations." Abbott v. United States, 562 U.S. 8, 20 (2010); see id. at 25 (explaining that Section 924(c) "reiterate[s] [that command] three times"). Nothing in Section 924(c) or in the overall framework for sentencing established by the Sentencing Reform Act supports the "implausible" conclusion that Congress left courts free to negate the imposition of "additional punishment for § 924(c) violations," 562 U.S. at 20 (emphasis omitted), by zeroing out sentences for separate and simultaneous convictions.

The Sentencing Reform Act specifies distinct procedures for how sentencing courts should determine (1) the appropriate sentence of imprisonment for each individual offense for which a defendant is convicted, 18 U.S.C. 3582(a), and (2) the aggregate sentence when a defendant is convicted for multiple criminal offenses, 18 U.S.C. 3584(b). First, the length of each "term of imprisonment" must be determined by considering the factors in Section 3553(a), see 18 U.S.C. 3582(a), which requires the sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with [several statutory] purposes," 18 U.S.C. 3553(a), including the need to "reflect the seriousness of the offense" and "provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A). In doing so, the court must consider

"the nature and circumstances of the offense" and "the history and characteristics of the defendant." 18 U.S.C. 3553(a)(1).

Because a sentencing court must consider the particular circumstances of each offense, the court may increase a sentence for an offense to reflect the severity of the defendant's offense conduct if, for instance, the defendant possessed a firearm during that offense. See, e.g., Sentencing Guidelines §§ 2B3.1(b)(2) (recommending firearms enhancement under the robbery guideline), 2D1.1(b)(1) (recommending firearm enhancement under the drug guideline). If a defendant is convicted of both a crime of violence or drug-trafficking offense and a Section 924(c) offense for possessing a firearm in furtherance of the predicate crime, however, a court determining the sentence for the predicate offense may consider that Congress has already specified a separate punishment in Section 924(c) for the additional danger posed by the firearm. See Muscarello v. United States, 524 U.S. 125, 132 (1998) (purpose of Section 924(c), according to its chief sponsor, is "to persuade the man who is tempted to commit a Federal felony to leave his gun at home") (citation omitted). The separate punishment under Section 924(c) is not displaced by the existence of a parallel conviction under a statute carrying its own firearms enhancement. Abbott, 562 U.S. at 23. But a sentencing court may exercise discretion under Section 3553(a) to set the length of the

sentence for the non-Section 924(c) offense without an enhancement for the involvement of a firearm. Indeed, the Sentencing Guidelines have long incorporated such a recommendation. See Sentencing Guidelines § 2K2.4, comment. (n.4).

When "a person [is] convicted of more than one offense," Section 3584 "provides the rules for determining the [overall] length of a term of imprisonment," S. Rep. No. 225, 98th Cong., 1st Sess. 125-126 (1983) (Senate Report), in light of the "multiple terms of imprisonment" imposed for those offenses. See 18 U.S.C. 3584(a). See also Senate Report 177 (explaining that "the sentences for each of the multiple offenses should be determined separately and the degree to which they should overlap be specified"). Section 3584 requires a sentencing court to determine "whether the terms imposed are to be ordered to run concurrently or consecutively" by "consider[ing], as to each offense for which a term of imprisonment is being imposed, the factors set forth in [S]ection 3553(a)." 18 U.S.C. 3584(b). That determination allows the sentencing court to set the length of the aggregate sentence (by running the individual sentences concurrently or consecutively) based on its own discretionary determination that the total duration of imprisonment is "sufficient, but not greater than necessary," to advance the goals of, for instance, providing "just punishment," affording an "adequate deterrence to criminal conduct," and protecting the public

from future crimes. 18 U.S.C. 3553(a) and (a)(2). Under that Section 3584 authority, a court can thus ensure that two or more prison sentences for different offenses do not result in a total punishment that in the court's view would be "greater than necessary" (18 U.S.C. 3553(a)) by ordering that the prison terms run concurrently. After the court has determined whether to run each such sentence concurrently or consecutively, the "[m]ultiple terms of imprisonment" are "treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. 3584(c).

The Sentencing Guidelines reflect that approach. Because the sentence of imprisonment for each offense must be based on the "circumstances of th[at] offense," 18 U.S.C. 3553(a)(1), the Guidelines generally require a sentencing judge to evaluate as a group all closely related counts and then to determine an overall offense level for such related offense conduct. See Sentencing Guidelines §§ 3D1.1(a)(1)-(2), 3D1.2, 3D1.3. After a combined offense level is determined for all groups of closely related counts, see §§ 3D1.1(a)(3), 3D1.4, that offense level determines the total punishment that the Guidelines recommend be imposed (subject to any statutory maximum punishment) "on <u>each</u> * * * count" of conviction, except those (like Section 924(c)) for which a consecutive term of imprisonment must be imposed by statute. § 5G1.2(b) (emphasis added). "If the sentence imposed

on the count carrying the highest statutory maximum is adequate to achieve the total punishment," the Guidelines recommend that (to the extent allowed by law) the "sentences on all counts [should] run concurrently." § 5G1.2(c). Otherwise, the sentencing court should direct that the "sentence imposed on one or more of the other counts shall run consecutively" "to the extent necessary" to produce what the court deems to be an appropriate total punishment. § 5G1.2(d). Cf. Senate Report 165 (stating that the Guidelines should address "the appropriateness of concurrent, consecutive, or overlapping sentences").

Section 924(c) modifies that normal mode of sentencing. See United States v. Gonzales, 520 U.S. 1, 6, 9-10 (1997). Although the sentencing court is still required to determine the "length of the term" of imprisonment for each offense (see 18 U.S.C. 3582(a)) such that the term of imprisonment on each individual count is "sufficient" to "reflect the seriousness of" and to "provide just punishment for the offense" at issue, 18 U.S.C. 3553(a) and (a)(2)(A), Congress partially displaced the court's authority under Section 3584(b) to tailor the aggregate sentence based on the court's discretionary determination that the total length will be "sufficient, but not greater than necessary," to advance the objectives listed in Section 3553(a). Congress did so in Section 924(c) by prohibiting the sentencing court from making any term of imprisonment imposed under Section 924(c)

"run concurrently with any other term of imprisonment." 18 U.S.C. 924(c)(1)(D)(ii). The term of imprisonment for a Section 924(c) offense thus must be imposed "in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A); see Gonzales, 520 U.S. at 10.

As a result, a sentencing court must determine the appropriate sentence for all non-Section 924(c) counts and must then "independently" impose a Section 924(c) sentence to run consecutively to all other terms of imprisonment. Sentencing Guidelines § 5G1.2(a) & comment. (n.2(A)). Nearly all courts of appeals to have addressed the issue have concluded that a sentencing court may not reduce the sentence for a predicate offense under 18 U.S.C. 3553(a) simply to lower the aggregate sentence that results from the consecutive, mandatory-minimum sentence for a Section 924(c) offense. See, e.g., United States v. Williams, 599 F.3d 831, 834 (8th Cir.) (applying United States v. Hatcher, 501 F.3d 931, 933-934 (8th Cir. 2007), cert. denied, 552 U.S. 1170 (2008)), cert. denied, 559 U.S. 1084 (2010) (No. 09-9733); United States v. Calabrese, 572 F.3d 362, 369-370 (7th Cir. 2009) (reaffirming United States v. Roberson, 474 F.3d 432, 436 (7th Cir. 2007)), cert. denied, 559 U.S. 1005 (2010) (No. 09-446); United States v. Chavez, 549 F.3d 119, 131-135 (2d Cir. 2008); United States v. Franklin, 499 F.3d 578, 583-586 (6th

Cir. 2007); see also, e.g., United States v. Powell, 444 Fed. Appx. 517, 522 (3d Cir. 2011) (not precedential), cert. denied, 132 S. Ct. 1907 (2012) (No. 11-7849); United States v. McCullers, 395 Fed. Appx. 975, 978 (4th Cir. 2010) (per curiam) (not precedential), cert. denied, 562 U.S. 1246 (2011) (No. 10-8472).[1]

The district court in this case correctly sentenced petitioner to 40 months of concurrent imprisonment on each of his three Hobbs Act counts and his felon-in-possession count. The "length of the term [of imprisonment]" for each of those counts was determined based on "the factors set forth in section 3553(a)," 18 U.S.C. 3582(a), in order to be "sufficient" to reflect, inter alia, the "nature and circumstances of [each] offense" and to "provide just punishment for the offense," 18 U.S.C. 3553(a) and (a)(2). The district court explained that the 40-month term was an appropriate downward variance from the 84- to 105-month Guidelines range for the offenses. Sent. Tr.

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[1] Two courts of appeals that considered this Section 924(c) issue before this Court held the Guidelines advisory in United States v. Booker, 543 U.S. 220 (2005), reached different conclusions. Compare United States v. Webster, 54 F.3d 1, 4 (1st Cir. 1995) (holding that the proper resolution of the question "had no impact on the [defendant's] sentence," but stating that, "in departing from a guideline sentence the district court is free to exercise its own judgment as to the pertinence, if any, of a related mandatory consecutive sentence"), with United States v. Working, 287 F.3d 801, 807-808 (9th Cir. 2002) (concluding that "the Sentencing Guidelines take into account the impact of 18 U.S.C. § 924(c), and thus the mandatory consecutive sentence is not a basis for a downward departure").

12. And that Guidelines range, consistent with Section 2K2.4, comment. (n.4), did not include a firearms enhancement. PSR ¶¶ 19, 30.

But the court made clear that "just looking at the conduct in [the Hobbs Act] Counts," "there's no way [it] would * * * vary down to one day" and that no "judge in the country" would likely do so. Sent. Tr. 9. Although "[n]ormally, a district court has authority to decide whether federal prison terms should run concurrently with or consecutively to other prison sentences," Gonzales, 520 U.S. at 6 (citing 18 U.S.C. 3584(a)), thus allowing a court to take into account the aggregate sentence produced by multiple counts of conviction, Section 924(c) divests the court of that authority. And the district court here correctly concluded that it lacked discretionary authority to achieve the equivalent result by reducing petitioner's sentence, as he requested, to one day. See Sent. Tr. 12. If the district court had sentenced petitioner to only one day for the non-Section 924(c) offenses instead of the 40 months that it deemed appropriate based on the nature of those felony offenses, the district court would have reached precisely the same result prohibited by Section 924(c): The 40-month sentences would have effectively been made to run concurrently with the term of imprisonment imposed by Section 924(c) with only one day of consecutive imprisonment.

b. Petitioner contends (Pet. 11-12) that the decision of the court of appeals in this case "is contrary to this [C]ourt's decision in Pepper," which discussed 18 U.S.C. 3553 and 3661 and which, in petitioner's view, "overruled" the Hatcher decision that the panel followed here. That is incorrect.

Pepper neither conflicts with nor overrules Hatcher or any other relevant Section 924(c) sentencing decision. Pepper concluded that Congress's enactment of Section 3661 "codified the 'longstanding principle that sentencing courts have broad discretion to consider various kinds of information'" about a defendant. 562 U.S. at 488 (citation omitted). Section 3661 does so by providing that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a sentencing court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Pepper also discussed the Section 3553(a) factors informed by such information, including the defendant's history and characteristics and the need to provide an adequate deterrence and to protect the public. 562 U.S. at 491-492. Pepper then ultimately held that a sentencing court may consider evidence of postsentencing rehabilitation when resentencing a defendant. Id. at 481, 493.

Those conclusions do not address the question presented here. The government does not contend that a district court

must blind itself to any relevant facts, nor does it argue that Section 3661 allows information to be excluded from the court's consideration. Quite the contrary, the Guidelines, whose advice the court must consider, decline to enhance the sentence for a predicate offense based on the defendant's possession, brandishing, use, or discharge of a firearm during that offense if the defendant has also been convicted of committing a Section 924(c) offense in connection with that predicate offense. See Sentencing Guidelines § 2K2.4, comment. (n.4). Such an enhancement is unwarranted, the Commission concluded, because the Section 924(c) punishment specified by Congress already accounts for the distinct involvement of the firearm in the offense. A district court exercising its sentencing discretion may still elect to enhance the punishment on the non-Section 924(c) conviction when a firearm is involved in the offense. But it may also consider that Congress has specified a separate punishment under Section 924(c) for the additional danger of possessing or using a firearm during the predicate offense and consider that factor in exercising discretion in sentencing on the non-Section 924(c) count under Section 3553(a). What it may not do is negate punishment on the Section 924(c) offense because of a conclusion that the Section 924(c) conviction is by itself sufficient to provide sufficient punishment. See pp. 11-19, supra.

c. Petitioner argues (Pet. 12-13) that the court of appeals' decision conflicts with the Tenth Circuit's divided decision in Smith, which held that a sentencing court may "consider[] a § 924(c) conviction and sentence when seeking to assign a just punishment for a related crime of violence." 756 F.3d at 1193. The result in Smith conflicts with the result in this case and the result in other courts of appeals in similar cases, based on Smith's conclusion that the provisions in Section 924(c) requiring consecutive sentences and "addition[al]" punishment did not divest the district court of authority to consider the aggregate sentence as relevant to determining the sentence for a related non-Section 924(c) crime. Smith's reasoning, however, does not address the statutory provisions described above, including the interaction between Section 3584 and Section 924(c). The government did not present those arguments in Smith, see U.S. Br. at 24-30, United States v. Smith, No. 13-1112 (10th Cir.) (filed Sept. 3, 2013), and it did not seek rehearing in that case. As explained below, this Court's review is unwarranted at this time.

Smith begins with the premise that requiring a district court to disregard a defendant's conviction under Section 924(c) would require the court to take a "blinkered view" when sentencing a defendant on non-Section 924(c) counts, forcing it to "studiously ignore" the aggregate length of the prison sentences

that would result after any Section 924(c) sentences are consecutively stacked on the others. 756 F.3d at 1180. Like petitioner, Smith relies on the fact that Section 3661 instructs that "[n]o limitation" should normally be imposed on the information that a sentencing court may consider. Id. at 1181-1183. Indeed, Smith notes that the Sentencing Guidelines show that "a [Section] 924(c) sentence should influence (and serve to reduce)" the sentence for an underlying predicate offense because, when a defendant is convicted of a Section 924(c) offense, applying a firearm enhancement to the predicate offense would result in duplicative punishment. Id. at 1188. Smith additionally emphasizes that "[Section] 3553(a) directs courts to 'impose a sentence sufficient, but not greater than necessary, to comply'" with statutory sentencing goals. Id. at 1183 (quoting 18 U.S.C. 3553(a)).

Those points in Smith -- with which the government generally agrees -- do not address the key issue here. Nothing in Smith deals with the way in which Section 924(c) displaces the ordinary authority of a court under Section 3584(b) to consider and determine the aggregate length of all terms of imprisonment in light of the Section 3553(a) factors by running sentences either consecutively or concurrently, and the implications of that statutory scheme for sentencing. Indeed, Smith neither cites nor discusses that Section 3584 authority.

Smith thus arrived at a conclusion that is just as anomalous as the conclusion that this Court rejected in Abbott as inconsistent with Section 924(c)'s "longstanding thrust." 562 U.S. at 20. Abbott rejected, as producing "sentencing anomalies Congress surely did not intend," arguments that would result in no punishment being imposed under Section 924(c) because of the punishment imposed under other counts of conviction. 562 U.S. at 21. Smith produces the equally anomalous, converse result: a court may effectively negate punishment on a non-Section 924(c) offense because the defendant is being punished under Section 924(c). The interaction of Section 3584 and Section 924(c), read together with the count-by-count framework of sentencing law, refutes that conclusion.

The government has yet to present its current arguments to the Tenth Circuit, which may adopt them, thus obviating any need for further review in this Court. Moreover, since Smith, which the Tenth Circuit decided only two years ago, the only courts of appeals to have addressed the question presented are those with prior binding precedent on the issue. No court of appeals since Smith has therefore addressed the question afresh. Given the relatively new and quite limited division of authority on the question presented, intervention by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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